No. 83-1804

In the Supreme Court of the United States

October Term, 1983

SANDUSKY REAL ESTATE, INC.,
d/b/a REAL ESTATE ONE, *et al.*,
Petitioners,

vs.

DEWITT and ELLA McDONALD,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the Sixth Circuit Court of Appeals erred in reversing the district court by holding that the judgments for Respondents against Petitioners for damages, attorneys' fees and costs should be joint and several.

(2) Whether the Sixth Circuit Court of Appeals erred in reversing and remanding the district court's judgment and order as to Respondents' counsel's hourly rate and reduction of hours with instructions that the district court comply with the requirements of the Sixth Circuit Court of Appeals' decision in *Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

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OPINION BELOW

The opinion from the Sixth Circuit Court of Appeals from which review is sought was entered December 23, 1983 (Pet. App. pp. 22-27).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The substantive facts surrounding Respondents' claims which gave rise to this litigation and their claims of racial discrimination by Petitioners in their attempts to negotiate for and purchase property in violation of 42 U.S.C. §§1982 and 3601, *et seq.*, are set forth in *McDonald v. Verble*, 622 F.2d 1227 (6th Cir. 1980) (Pet. App. pp. 35-50).

The district court's dismissal of Respondents' claims with Respondents to bear Petitioners' costs was vacated and remanded to the district court for a determination of damages, of costs and attorneys' fees in favor of the Respondents after the Court of Appeals found that the record established ". . . that both the spirit and the letter of the federal statutes dealing with fair housing were repeatedly violated by both defendants. . .". 622 F.2d at 1232.

Thereafter on remand Respondents presented evidence as to damages and the reasonableness of their requested attorneys' fees and costs through the testimony of Respondents and Attorneys Phillips and Willging practicing attorneys in the Toledo, Lucas County area. Petitioners failed to present any evidence at said evidentiary hearing in opposition to Respondents' counsel's requested hourly rates or hours requested for compensation. Thereafter the district court issued its memorandum, decision and judgment entry on Respondents' damages, attorneys' fees and costs on October 5, 1981 (Pet. App. pp. 30-34) which was subsequently amended pursuant to cross motions for reconsideration of the parties on August 16, 1982 in the form of an amended judgment by the district court (Pet. App. pp. 27-28).

Respondents perfected their timely appeal from said judgments and during the pendency of said appeal settled all claims which they had with Defendants Verbles.

Oral arguments were held on Respondents' second appeal before the Sixth Circuit on October 23, 1983 which were attended by Petitioner Holderness and his counsel. After said argument Petitioner Holderness concluded that their position on appeal was in trouble and on October 30, 1983 he conveyed interest in the properties which he had in Ohio and Michigan to his wife. On February 7, 1984 Respondents sought leave to amend their complaint to set aside said conveyances as fraudulent in violation of §§1336.01, *et seq.*, of the Ohio Revised Code (Resp. App. p. A1).

On December 23, 1983 the Sixth Circuit Court of Appeals ordered that the district court's judgments on Respondents' damages, attorneys' fees and costs be reversed and that the matter be remanded to the district court with instructions that the district court assess additional compensatory and punitive damages for Respondents and that as to Respondents' counsel's attorneys' fees and costs that the district court enter their findings of fact as required by the Sixth Circuit's decision in *Northcross v. Board of Education of Memphis City Schools, supra.* The Court of Appeals found that as to Respondents' claimed attorneys' fees and costs that the district court had erred in four respects in that he had: (1) failed to make specific findings of fact required to reduce the hours claimed by Respondents' counsel; (2) disregarded Respondents' evidence as to their hourly rates and total hours claimed without contra evidence presented by Petitioners; (3) erred in concluding that Respondents' attorneys' fees should be reduced because of minimal compensatory damages entered in favor of Respondents; and (4) erred in reducing by twenty-five percent Respondents' attorneys' fees for alleged duplication of efforts.

REASONS FOR DENYING CERTIORARI

(A) The Court of Appeals properly ruled Petitioners jointly and severally liable for Respondents' damages, attorneys' fees and costs.

Petitioners argue that it was improper for the Court of Appeals to reverse the district court's individual assessment of damages among the various defendants because there was no "concert of action" among the defendants and that such joint and several liability would work a hardship upon Petitioners in this case.

The Court of Appeals noted in Appeal I in this case that Petitioner Holderness had after properly apprising the owners of the obligation to show the property to all interested purchasers, thereafter engaged in numerous and repeated violations of the fair housing laws which were italicized by the Court in its opinion. It is clear that under the fair housing laws Petitioner Real Estate One is liable for the actions of its broker-salesman, Petitioner Holderness, and likewise Petitioner Holderness becoming the sales agent acting on behalf of defendants Verbles is equally responsible for their actions as well as his own. In addition it is equally clear that the duty not to discriminate is non-delegable. See, *Marr v. Rife*, 503 F.2d 735 (6th Cir. 1974); *U.S. v. Bob Lawrence Realty Co.*, 474 F.2d 115 (5th Cir. 1973), *cert. denied*, 414 U.S. 826 (1973); *U.S. v. Northside Realty Associates, Inc.*, 474 F.2d 1165 (5th Cir. 1973); *Seaton v. Sky Realty Co.*, 372 F. Supp. 1322 (N.D. Ill. 1972), *aff'd.*, 491 F.2d 634 (7th Cir. 1974); *U.S. v. Youritan Construction Co.*, 370 F. Supp. 643 (N.D. Ca.), *aff'd.*, 509 F.2d 623 (9th Cir. 1975); *Harrison v. Otto G. Heinzroth Mortgage Co.*, 430 F. Supp. 893 (N.D. Ohio 1977).

Petitioners have acknowledged in their briefs below that the applicable basis for determining individual or joint and several liability is to be derived from State law. They further acknowledged that the controlling Ohio case on liability of joint tort feasors is set forth in *Larson v. Cleveland Railway Co.*, 142 Ohio St. 20 (1943). That case sets forth the "concert of action" standards for imposition of liability among tort feasors in light of their relationships and the facts of the case. Relying upon the law of the State of Ohio as applied to the facts of the case the Court of Appeals in Appeal II found that as a matter of law the district court's apportionment of liability was improper and that joint and several liability should be imposed.

Petitioners' reliance upon the Court's decision in *Northwest Airlines, Inc. v. Transport Workers*, 551 U.S. 77 (1981) is misplaced. The decision of this Court in *Northwest* was that an employer subject to back pay liability for violations of the Equal Pay Act, 29 U.S.C. §206 (d) and Title VII of the Civil Rights Act of 1966, 42 U.S.C. §§2000e, *et seq.*, have no statutory or common law right to contribution from unions allegedly responsible for the violations. It should be pointed out that the issue arose when a female cabin attendant commenced a class action suit against the airlines for violations of said Act. Petitioner ultimately was awarded damages for herself and the class she represented in excess of $20,000,000.00 in back pay, damages and interest against the airline. Petitioner sought no claim against the union. The airlines brought the union in as a non-allied party under Rule 19(a) of the Federal Rules of Civil Procedure. It was only after judgment against them that the airlines sought contribution from the union. In the instant case brought pursuant to the fair housing laws Petitioners could have cross-claimed against defendants Verbles or sought contribution from the pri-

mary tort feasor but chose not to do so. In a case with similar fact patterns to those presented in the instant case it was found the real estate agent who assisted his principal, the owners of the property, in racially motivated rejections of offers to purchase was liable as a joint tort feasor. *Dillon v. AFBIC Development Corp.*, 597 F.2d 556, 562 (5th Cir. 1979).

Petitioners' assertion that Respondents are precluded from joint and several liability because of their failure to plead a conspiracy or concert of action among the Petitioners is equally misplaced. Such a determination of "concert of action" is factual in nature pursuant to the dictates of *Larson* and not a matter of pleading.

Furthermore, Petitioners' assertion that to assess joint and several liability would result in inequity in that Petitioners would be required to satisfy the brunt of the judgments against the various defendants is equally unpersuasive. Again, Petitioners could have cross-claimed and/or sought contribution from defendants Verbles and they chose not to do so. The fact that defendants Verbles may have moved their assets out of State would not have precluded Petitioners from obtaining judgments against defendants Verbles and seeking to have said judgments given full faith and credit by another State upon which execution could be had or they could have sought pursuant to Ohio's prejudgment attachments statute, §§2715.01, *et seq.*, of the Ohio Revised Code, to prevent such assets from being conveyed and chose not to do so. In fact the evidence in this case reveals that after oral arguments on Appeal II Petitioner Holderness sought to fraudulently divest himself of assets from which any judgment could be satisfied by Respondents.

(B) It was not error for the Court of Appeals to reverse and remand the district court's judgment as to Respondents' counsel's attorneys' fees in light of the fact they were the prevailing party and introduced uncontradicted evidence as to the reasonableness of their hourly rate and hours claimed.

Petitioners contend that the Court of Appeals erred in reversing the district court's decision when in its discretion it reduced Respondents' counsel's attorneys' fees because said attorneys' fees were disproportionate to the relief which was obtained by Respondents. Petitioners' arguments do not accurately set forth the Court of Appeals' decision nor are they supported by this Court's recent decisions in *Hensley v. Eckerhart,* ..... U.S. ....., 51 U.S. L.W. 4552 (1983) and *Blum v. Stenson,* ..... U.S. ....., 52 U.S.L.W. 4377 (1984) and the Sixth Circuit's controlling decision in this area as set forth in *Northcross v. Board of Education of Memphis City Schools, supra.*

Respondents in this case were represented initially by Mr. McCarter, then approximately seven months after the institution of the lawsuit Mr. Spater was brought in as co-counsel. Mr. McCarter, in his affidavit filed in support of his attorney's fees, requested hourly compensation from 1976 to 1979 at a rate of $60.00 per hour and from 1980 to 1981 at a rate of $75.00 per hour. Mr. Spater requested compensation from 1976 through 1978 at a rate of $60.00 per hour, $70.00 per hour from 1978 through 1979, and $75.00 per hour from 1980 to 1981. The district court for no reason other than the fact that this case in its opinion was "an individual, simple discrimination case" where the attorneys' fees sought were fifteen times the damages recovered reduced Mr. McCarter's hourly rate to

$40.00 per hour and Mr. Spater's hourly rate to $35.00 an hour and then discounted twenty-five percent of the hours claimed for "duplication and unnecessary activity" with no further explanation or findings (Pet. App. pp. 41-51).

The Court of Appeals reversed and remanded the district court's judgment as to Respondents' counsel's attorneys' fees with instruction that the district court correct its judgment which was erroneous in four areas. The district court was instructed to enter a finding of fact as required by *Northcross* and Rule 52(a) of the Federal Rules of Civil Procedure as to why counsel's hours claimed were reduced by the district court. This aspect of the Court of Appeals' instructions is proper as this Court has stated in *Hensley* and reaffirmed in *Blum* that the initial estimate of reasonable attorney's fees under §1988 is properly calculated by multiplying the number of hours reasonably spent times a reasonable hourly rate with the party seeking the award required to submit some evidence supporting the hours worked and the rates claimed. 51 U.S.L.W. at 4554. In addition, *Northcross* dictates that "[A] fee calculated in terms of hours of service provided is the fairest and most manageable approach" in determining attorney's fees and that the district court may only cut hours claimed "for duplication, padding, or frivolous claims", but if hours are cut the court must "identify those hours and articulate its reasons for their elimination" with it being impermissible, however, to eliminate wholesale the services of attorneys without identifying the particular services which are regarded as duplicative. 611 F.2d 636-637. Thus, it was entirely proper for the Court of Appeals to instruct the district court that if in its discretion it reduced Respondents' counsel's hourly rate and hours claimed that it enter specific findings of fact as to the reasons why and the hours that were reduced.

The Court of Appeals further instructed on remand that the district court was not to reduce Respondents' counsel's fees in absence of evidence introduced by the Petitioners contrary to the claimed hours and hourly rates. In this case Petitioners introduced absolutely no evidence that Respondents' counsel's hours or hourly rate were improper. Respondents' counsel on the other hand in addition to their affidavits presented testimony in the form of expert witnesses, Dan Phillips, a long standing respected member of the defense bar in the Toledo, Lucas County, Ohio area, and Thomas Willging, an experienced civil rights attorney and law school faculty member, who testified that Respondents' counsel's hours were reasonable, the hourly rate was proper and the hours claimed were proper and reflected the market value for services rendered by attorneys with Respondents' counsel's expertise in the field and length of time in practice. Such testimony was not contradicted nor challenged by Petitioners. Thus, as in *Blum*, Petitioners should not be heard herein to challenge the hours claimed or hourly rates charged by Respondents as being unreasonable when they introduced no evidence contra. 52 U.S.L.W. at 4378.

The Court of Appeals also instructed on a related basis that the district court should not reduce Respondents' counsel's attorneys' fees by twenty-five percent for duplication of effort where the only evidence of such duplication which the record supports is that said counsel appeared together at the trial and at the damage hearings. In fact the record in this case reflects that Respondents' counsel made a conscientious effort not to duplicate time by handling separate aspects of discovery, preparing and examining separate witnesses at trial, and drafting and arguing separate aspects of the issues presented on the appeals. Furthermore, Petitioners have, throughout the

course of the proceedings for which the attorneys' fees are challenged, been themselves represented by two counsel. Petitioners' allegation that Respondents' counsel spent two and a half times the hours spent by Petitioners' counsel is both inaccurate and unpersuasive. The record in this case reflects that many of the hours spent in this case were not documented by Petitioners' counsel and indeed the hours spent by Attorney Scheidel for Real Estate One were not even submitted. Again, both Phillips and Willging testified that Respondents' counsel's hours did not appear to include any duplication of effort. Even if there had been evidence of duplication of effort by Respondents' counsel, which there was not, *Northcross* instructs that the district court may take this factor into consideration by reducing "some small percentage" of the total hours claimed. 611 F.2d at 637.

The Court of Appeals' final instruction on remand was that in assessing attorneys' fees the district court should not consider the amount of compensatory damages in determining the attorneys' fee award. This is clearly the state of the law as enunciated by this Court in *Hensley* where it was repeatedly emphasized that the crucial factor in determining attorney's fees under §1988 was ". . . the degree of success obtained". 51 U.S.L.W. at 4555. There can be no question that Respondents are "the prevailing party" in this action and have succeeded though it has taken two appeals, in prevailing under all claims and for all relief which was sought in their initial complaint. As was emphasized in *Hensley*:

> Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. *Id.*, at p. 4555.

This effectuates the purpose of §1988 by assuring effective access to the judicial process for all persons with civil rights grievances. *Id.*, at 4553. The Sixth Circuit in applying *Northcross* has consistently emphasized that the amount of damages obtained by the plaintiff does not control the amount of the attorney's fees. As the Sixth Circuit Court of Appeals stated in *Kinney v. Rothchild*, 678 F.2d 658, 660 (6th Cir. 1982):

> We see no reason for an exception here. The purpose of Section 1988 is to encourage lawyers to accept civil rights cases in which damages may be small, nominal or nonexistent. *Northcross* has the effect of guaranteeing that a lawyer will be awarded fees for all of his hours reasonably spent in presenting the issues on which his side prevails. Greatly reduced fees, such as were awarded in this case, will discourage lawyers from accepting housing discrimination cases and vindicating the rights Congress had in mind. Another reason for following *Northcross* is the need for contingency in determining attorney's fees.

See, *Northcross v. Board of Education of Memphis City Schools*, 611 F.2d at 633.

A reduction of Respondents' counsel's attorneys' fees premised upon an argument that this was a simple case which did not affect the rights of numerous individuals is equally unpersuasive. In *Blum* this Court emphasized that in calculating attorney's fees under §1988 the number of persons benefited by the result should not be a consideration in calculating fees 52 U.S.L.W. at 4381, n.16. *Northcross* has also been applied as the standard by which district courts should exercise their discretion in awarding attorney's fees under §1988 and has been held applicable to relatively simple employment discrimination cases

brought by one plaintiff. *Horace v. City of Pontiac,* 624 F.2d 765 (6th Cir. 1980). Respondents, however, disagree that this was a relatively simple case which did not affect numerous individuals. This case was filed in 1979 and was the first fair housing case ever tried to the district court at a time when neither that court nor the Sixth Circuit Court of Appeals had set standards for fair housing cases. The two appeals in this case have resulted in not only Respondents achieving the relief which they sought but in the enunciation of standards which are to be a guide for determination of the validity of claims under the fair housing laws in the Sixth Circuit and its district courts. Furthermore, as Respondents' experts testify in light of the "contingency" nature of the attorney's fees in these types of cases it would have been difficult, if not impossible, for Respondents to have obtained in the Toledo, Lucas County area competent counsel who were willing to undertake such a risky and unpopular case other than Mr. McCarter and Mr. Spater. It is for this reason that Respondents have sought and still seek an upward adjustment of twenty-five percent of their attorneys' fees in this case which has been held to be proper under §1988 where the success obtained is "exceptional". See *Blum v. Stenson,* 52 U.S.L.W. at 4380; *Northcross v. Board of Education of Memphis City Schools,* 611 F.2d at 638.

The cases cited by Petitioners in their brief are unpersuasive in that they do not encompass this Court's standards for the procedure to determine nor standards to be adhered to in awarding attorney's fees under §1988 as enunciated in *Hensley* and *Blum* nor the Sixth Circuit's guiding decision in *Northcross.* Furthermore it should be emphasized as Mr. Justice Brennan noted in his opinion in *Hensley,* concurring in part and dissenting in part, that appeals as to the reasonableness of attorney's fees in civil rights cases greatly increase the costs to plaintiffs of

vindicating their rights, and thus frustrate the purposes of §1988. 51 U.S.L.W. at 4557. Such frustration is evidenced in this case in that despite proceeding through trial, two appeals and now of posing a petition for certiorari to this Court, Respondents' counsel have not received one cent of money from Petitioners for their attorneys' fees related to perfecting Respondents' claims and indeed the issue of the reasonableness of an amount of their attorneys' fees is still unresolved without the benefit of a final judgment upon which they may act. The district court in this case knew and Respondents feel confident that this Court recognizes that such delays certainly discourage as much as any other consideration counsel from desiring to take civil rights cases. This has the effect, as the Court warned in 1968 in its decision in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441-443 (1968), of rendering our laws against discrimination to be "a mere paper guarantee."

CONCLUSION

Respondents respectfully request that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Excerpt From Transcript of Deposition of Petitioner Holderness

(Taken on January 31, 1984)

[49] Q. Now, you've told us that you transferred your interest to the property in Michigan and in your house in Perryburg after the arguments down in Cincinnati on advice of counsel; do you recall that testimony? A. Yes.

Q. And you can't recall why it was that this occurred after those arguments down in Cincinnati; did your counsel tell you that the arguments had gone badly? A. I just could see that when I was there.

Q. You could see that those arguments weren't going well for your side, correct? A. I observed that, yes.